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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 DONALD PLEASANT,

11 Plaintiff,

12 v.

13 ALISA WARNER, *et al.*,

14 Defendants.

CASE NO. 3:19-cv-05249-RJB-JRC

ORDER TO SHOW CAUSE OR
AMEND COMPLAINT AND
DENYING MOTION FOR
APPOINTMENT OF COUNSEL

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16 Plaintiff Donald Pleasant, proceeding *pro se* and *in forma pauperis* (Dkts. 4, 5), brings
17 this matter under 42 U.S.C. § 1983. The District Court has referred this matter to United States
18 Magistrate Judge J. Richard Creatura under 28 U.S.C. § 636(b)(1)(A), (1)(B) and Local
19 Magistrate Judge Rules MJR 1, 3, and 4. *See* Dkt. 2.

20 Having reviewed and screened plaintiff's complaint under 28 U.S.C. § 1915A, the Court
21 declines to serve the complaint because plaintiff has yet to sufficiently make a claim for relief
22 under § 1983. Although plaintiff alleges that defendants violated his rights by falsifying an
23 allegation of sexual harassment and then ignoring exonerating evidence at his hearing on the
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1 matter, he fails to identify particular constitutional rights or the elements of any particular cause
2 of action under § 1983 against most defendants. And although plaintiff does identify “due
3 process”—presumably procedural—as the basis of his claim against a hearing officer, defendant
4 Klepps, plaintiff fails to identify how he was deprived of a protected interest for procedural due
5 process purposes.

6 The Court provides plaintiff leave to file an amended pleading by **July 5, 2019** to cure
7 the deficiencies identified herein. The Court also denies plaintiff’s motion for appointment of
8 counsel without prejudice.

9 10 **BACKGROUND**

11 Plaintiff, who is incarcerated at Olympic Corrections Center (“OCC”), brings claims
12 under § 1983 against Jason Bennett, OCC’s superintendent; Alisa Warner and M. Canning, OCC
13 corrections officers; Michelle Klepps, a hearing officer; Sergeant William Johnson; and Michelle
14 Walker, a Department of Corrections official. *See* Dkt. 5, at 2–3.

15 Plaintiff alleges that in September 2018, defendants Warner and Canning falsely accused
16 plaintiff and three other African-American prisoners of sexual harassment based on a wardrobe
17 malfunction that plaintiff suffered. *See* Dkt. 5, at 3. He further alleges that defendant Klepps
18 violated due process by disregarding video evidence that would exonerate plaintiff, instead
19 making her decision based upon an incomplete investigation. *See* Dkt. 5, at 3. He alleges that
20 defendant Bennett concurred in this decision based upon incomplete investigation despite being
21 “unable to make [a] fair judgement.” Dkt. 5, at 3. Finally, plaintiff alleges that defendant
22 Walker failed to respond to calls or mail that plaintiff apparently directed to her. *See* Dkt. 5, at 3.

1 Plaintiff requests “trial and compensation for falsified investigation and decision,
2 adversity [sic] action against me.” Dkt. 5, at 4. Plaintiff has also requested that this Court
3 appoint counsel to represent him. *See* Dkt. 6.

4 5 **DISCUSSION**

6 **I. Screening**

7 *A. General Principles*

8 Under the Prison Litigation Reform Act, the Court must screen complaints brought by
9 prisoners seeking relief against a governmental entity or officer or employee of a governmental
10 entity. 28 U.S.C. § 1915A(a). Section 1915A(b) authorizes dismissal of “the complaint, or any
11 portion of the complaint, if the complaint—(1) is frivolous, malicious, or fails to state a claim
12 upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune
13 from such relief.” *See also* 28 U.S.C. § 1915(e)(2). Dismissal at the screening stage should be
14 with leave to amend the complaint, unless it is clear from the face of the complaint that no
15 amendment could cure the deficiencies. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir.
16 1995).

17 *B. Failure To State a Claim*

18 To obtain relief under § 1983, plaintiff must show that (1) he suffered a violation of
19 rights protected by the Constitution or created by federal statute, and (2) the violation was
20 proximately caused by a person acting under color of state law. *See Crumpton v. Gates*, 947
21 F.2d 1418, 1420 (9th Cir. 1991). The first step in a § 1983 claim is therefore to identify the
22 specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

1 Here, however, plaintiff has failed to identify a particular constitutional right as the basis
2 for his claims against defendants Warner, Canning, Bennett, Johnson, or Walker. For instance, it
3 is unclear whether plaintiff's claim alleges racial discrimination in violation of the Fourteenth
4 Amendment, retaliation for protected conduct under the First Amendment, or some other
5 constitutional violation. The Court notes that plaintiff's motion for appointment of counsel
6 identifies racial discrimination under the Fourteenth Amendment as the basis for this claim (*see*
7 Dkt. 6, at 4), but this Court cannot use plaintiff's motion for appointment of counsel to discern
8 his complaint's allegations. *See Cato*, 947 F.2d at 1420 (allegations must be determined from
9 "the face of the complaint"). Plaintiff must therefore amend his complaint to include the
10 constitutional basis for his allegations.

11 Similarly, it is unclear whether plaintiff's claim against defendant Bennett, the OCC
12 superintendent, for allegedly concurring in defendant Klepps' "incomplete" decision at
13 plaintiff's hearing, seeks damages for a violation of substantive or procedural due process, equal
14 protection, the First Amendment right to freedom from retaliatory conduct, or some other alleged
15 constitutional violation. This Court is similarly unable to determine the constitutional right that
16 plaintiff alleges defendants Walker and Johnson violated. Again, this Court cannot rely on
17 plaintiff's motion for appointment of counsel to supplement the allegations of his complaint.

18 A complaint fails to state a claim if it does not contain a sufficient statement of the claim
19 or claims to "give the defendant[s] fair notice of what the . . . claim[s] [are] and the grounds
20 upon which [they] rest[.]" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting
21 *Conley v. Givson*, 355 U.S. 41, 47 (1957)). Plaintiff will be given an opportunity to amend his
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1 complaint to include a short and plain statement of the particular constitutional right(s) that he
2 claims each defendant violated.

3 Additionally, because plaintiff seeks damages from individual defendants, if he chooses
4 to file an amended complaint, he must include facts detailing how each defendant caused or
5 personally participated in causing the harm alleged in the complaint. *See Arnold v. IBM Corp.*,
6 637 F.2d 1350, 1355 (9th Cir. 1981). Here, plaintiff's complaint includes no factual allegations
7 about how defendant Johnson participated in the alleged harm. Thus plaintiff's claim against
8 defendant Johnson is insufficient for this additional reason. *See Leer v. Murphy*, 844 F.2d 628,
9 634 (9th Cir. 1988) (a plaintiff must set forth specific facts about each individual defendant's
10 causal role in the alleged constitutional deprivation). If plaintiff chooses to file an amended
11 complaint, it must include particular facts and arguments about how each defendant caused or
12 personally participated in causing the specific constitutional violations that he alleges.

13 Finally, plaintiff appears to allege that defendant Klepps violated due process when she
14 found plaintiff guilty of a rule violation on the basis of staff reports and then imposed sanctions
15 of segregation, cell confinement, and loss of recreation. *See* Dkt. 5, at 7. The Court interprets
16 this as a claim that defendant Klepps violated plaintiff's right to procedural due process.
17 However, to establish such a claim on the basis of disciplinary sanctions, plaintiff must explain
18 how a protected liberty interest was implicated: that is, he must show that "the conditions of
19 confinement impose[d] an 'atypical and significant hardship on the inmate in relation to the
20 ordinary incidents of prison life.'" *Brown v. Oregon Dep't of Corrs.*, 751 F.3d 983, 987 (9th Cir.
21 2014) (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). Plaintiff makes no argument that
22 these elements have been met. If plaintiff wishes to proceed under procedural due process, he
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1 must provide facts and allegations to support that he suffered an atypical and significant
2 hardship.

3 **II. Motion for Appointment of Counsel**

4 Plaintiff requests that this Court appoint counsel to represent him. *See* Dkt. 6.

5 There is no constitutional right to appointed counsel in a § 1983 civil action, and whether
6 to appoint counsel is within this Court’s discretion. *Storseth v. Spellman*, 654 F.2d 1349, 1353
7 (9th Cir. 1981); *see United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir.
8 1995). Appointment of counsel for indigent civil litigants under 28 U.S.C. § 1915(e)(1) requires
9 “exceptional circumstances.” *See Rand v. Roland*, 113 F.3d 1520, 1525 (9th Cir. 1997) (citing
10 former 28 U.S.C. § 1915(d) (1996)), *overruled on other grounds*, 154 F.3d 952 (1998). To
11 decide whether exceptional circumstances exist, the Court must evaluate “both ‘the likelihood of
12 success on the merits [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of
13 the complexity of the legal issues involved.’” *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th
14 Cir. 1986) (quoting *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)). “Neither of these
15 factors is dispositive and both must be viewed together[.]” *Id.*

16 Although plaintiff argues that his underlying claims have merit as a reason to grant his
17 motion to appoint counsel (*see* Dkt. 6, at 4), at this time, having found that plaintiff’s complaint
18 fails to state a claim upon which relief can be granted, the Court disagrees.

19 Plaintiff also states that his institution does not have a law library. *See* Dkt. 6, at 2. A
20 plaintiff’s statement that he lacks law library access, standing alone, will not automatically result
21 in the appointment of counsel. *See, e.g., Williams v. Waddington*, C07-5216 RBL-KLS, 2007
22 WL 2471674, at *1 (W.D. Wash. Aug. 29, 2007) (finding that plaintiff had not shown that the
23 legal issues in his case were complex or that he was unable to articulate his claims *pro se*, even
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1 though he could not access a law library); *Moore v. Philips*, 10-cv-3273, 2010 WL 5067823, at
2 *2 (C.D. Ill. Dec. 7, 2010) (the fact that there was no law library access did not merit the
3 appointment of counsel at an early stage in the litigation); *Long v. Doe*, 08-cv-478-SLC, 2008
4 WL 4950080, at *2 (W.D. Wisc. Nov. 18, 2008) (although lack of access to a law library would
5 make prosecution of his case more difficult, under the circumstances, it would not prevent
6 plaintiff from litigating his case). Some districts have noted additional circumstances, beyond
7 the mere lack of law library access, that could merit granting such a request. *See Alvarez v.*
8 *Kristo*, cv-08-2226-PHX-DGC, 2009 WL 539676, at *1 (D. Ariz. March 4, 2009) (in addition to
9 no law library access, petitioner presented a novel and significant issue and there were no other
10 available forms of legal assistance); *see also Covarrubias v. Gower*, C-13-4611 (EMC), 2014
11 WL 342548, at *1 (N.D. Cal. Jan. 28, 2014) (noting that there was no indication of a lack of
12 other options, such as a legal paging system or ability to transfer to an institution with a law
13 library).

14 Here, plaintiff does not argue or attempt to demonstrate that lack of access to a law
15 library has prevented him from litigating his case. His claims do not appear to present novel or
16 unusually complex issues of substantive law, and he appears to be able to articulate those claims.
17 *See* Dkt. 6. Further, he has not demonstrated any circumstances beyond the mere lack of a law
18 library that would weigh in favor of appointing counsel. At this stage, therefore, the Court does
19 not find that lack of law library access merits the appointment of counsel.

20 For these reasons and because at present, the facts and legal issues do not appear
21 unusually complex such that plaintiff could not articulate his claims *pro se*, the Court finds that
22 plaintiff has not shown the exceptional circumstances required for the appointment of counsel.
23 Because the denial of plaintiff's motion to appoint counsel is without prejudice, plaintiff may
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1 renew his motion at a later time, if he is able to establish the exceptional circumstances
2 warranting appointment of counsel.

3 **III. Conclusion**

4 Due to the deficiencies described above, the Court will not serve plaintiff's amended
5 complaint. If plaintiff intends to pursue a section 1983 civil rights action in this Court, he may
6 file an amended complaint and within the amended complaint, he must write a short, plain
7 statement telling the Court: (1) *the constitutional right plaintiff believes was violated*; (2) the
8 name or names of the person or persons who violated the right; (3) *exactly what each individual*
9 *or entity did or failed to do*; (4) *how the action or inaction of each individual or entity is*
10 *connected to the violation of plaintiff's constitutional rights*; and (5) what specific injury plaintiff
11 suffered because of the individuals' conduct. *See Rizzo v. Goode*, 423 U.S. 362, 371–72, 377
12 (1976).

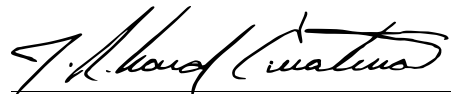
13 Plaintiff may present the amended complaint on the form provided by the Court. The
14 amended complaint must be legibly rewritten or retyped in its entirety, it should be an original
15 and not a copy, it should contain the same case number, and it may not incorporate any part of
16 the original complaint by reference. The amended complaint will act as a complete substitute for
17 the original complaint, and not as a supplement. The amended complaint should not rely on
18 motions in the record to supplement its allegations. An amended complaint supersedes all
19 previous complaints. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997), *overruled*
20 *in part on other grounds, Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012). Therefore,
21 the amended complaint must be complete in itself and all facts and causes of action alleged in the
22 original complaint that are not alleged in the amended complaint are waived. *Forsyth*, 114 F.3d
23 at 1474. The Court will screen the amended complaint to determine whether it contains factual
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1 allegations linking each defendant to the alleged violations of plaintiff's rights. The Court will
2 not authorize service of the amended complaint on any defendant who is not specifically linked
3 to a violation of plaintiff's rights.

4 If plaintiff fails to file an amended complaint or fails to adequately address the issues
5 raised herein **on or before July 5, 2019** the undersigned will recommend dismissal of this action
6 pursuant to 28 U.S.C. § 1915.

7 Plaintiff's motion to appoint counsel is **DENIED WITHOUT PREJUDICE**. The Clerk
8 is directed to send plaintiff the appropriate, most recent versions of the forms for filing a 42
9 U.S.C. § 1983 civil rights complaint and for service. The Clerk is further directed to send copies
10 of this order and Pro Se Instruction Sheet to plaintiff.

11 Dated this 4th day of June, 2019.
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15 J. Richard Creatura
16 United States Magistrate Judge
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